STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS. - NORTH JUNE TERM, 2007

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

NO. 07-S-0254

Motion To Bar The Death Penalty (No. 6)
Because New Hampshire's Capital Sentencing Statute
Unconstitutionally Limits Mitigating Evidence

The Accused, Michael Addison, and his Public Defenders respectfully request that the Court enter an order barring the death penalty in this case.

INTRODUCTION

1. The United States Supreme Court has repeatedly held that capital sentencing juries must be given an opportunity to consider all evidence of the circumstances of a capital murder when deciding whether to impose the death penalty. The New Hampshire capital sentencing statute violates this holding by imposing unconstitutional restrictions on evidence related to the circumstances of the murder. For this reason, the statute must be declared unconstitutional and the death penalty barred in this case.

FACTS AND PROCEDURAL CONTEXT

2. Michael Addison is charged with capital murder. The State has filed a Notice of Intent to Seek the Death Penalty. If Mr. Addison is convicted at trial of capital murder, his sentencing

hearing will be conducted soon thereafter before the same jury. Therefore, Mr. Addison has no alternative but to raise potential sentencing issues now.

3. As set forth below, New Hampshire's current capital sentencing scheme is invalid "on its face" in all capital cases because it violates the New Hampshire Constitution.

THE CONSTITUTIONAL RIGHT TO PRESENT MITIGATION EVIDENCE

4. The Eighth and Fourteenth Amendments require that capital sentencing juries be permitted to consider as mitigation "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1664 (2007).

5. This fundamental principle arose from a series of cases after Furman v. Georgia, 408 U.S. 238 (1972). In Woodson v. Georgia, 428 U.S. 280 (1976), the court considered a mandatory death penalty statute which did not permit consideration of any mitigating evidence. The court concluded (in a plurality opinion) that:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. . . . This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, supra at 304-305 (1976).

6. Woodson stated that mitigating evidence must be considered in capital sentencing, but it did not specify what mitigating evidence must be considered or whether all mitigating evidence must be considered. Subsequently, in Lockett, the Supreme Court answered those questions:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, supra, 438 U.S. at 604.

7. Perhaps because Lockett was yet another plurality opinion, or because of the phrase "in all but the rarest" cases, the principle set forth in Lockett had to be reaffirmed several times before gaining full acceptance. The court endorsed the same basic principle in Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) and in Skipper v. South Carolina, 476 U.S. 1, 4 (1986). Finally, in Hitchcock v. Dugger, 481 U.S. 393 (1987), a unanimous court held that that in "capital cases 'the sentencer' may not refuse to consider or 'be precluded from considering' any relevant mitigating evidence." Id. at 394 (citations and internal quotes omitted) (Justice Scalia later changed his view. See Walton v. Arizona, 497 U.S. 639, overruled on other grounds, Ring v. Arizona, 536 U. S. 584 (2002).)

8. Now, the fundamental principle that mitigation evidence must be considered is clearly established. As recently as this year, the court has repeated that:

> [S]entencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual. . . .

Abdul-Kabir v. Quarterman, supra, 127 S.Ct. at 1664.

9. The New Hampshire Supreme Court has never had an opportunity to decide whether the New Hampshire Constitution requires consideration of relevant mitigating evidence in capital sentencing, consistent with modern interpretations of the Eighth and Fourteenth Amendments.

However, the court has often stated that the due process protections in part 1, article 15 of our state constitution are greater than those in the federal constitution. See generally Motion To Bar The Death Penalty, No. 2. Furthermore, as noted in the defense Motion to Bar the Death Penalty No. 1, the language of the state constitution implies a greater concern for injustice in the capital sentencing context. See N.H. Const. pt. 1, arts. 15, 18 and 33. Thus, at the very least, our state constitution contains the principle, recognized under the Eighth and Fourth Amendments, that all mitigation evidence must be considered during the capital sentencing process.

THE NEW HAMPSHIRE CAPITAL SENTENCING STATUTE

10. New Hampshire's capital sentencing statute does not allow consideration of all mitigation evidence as required by the state and federal constitutions.

11. RSA 630:5, IV requires a finding of two different types of aggravating factors in order for a defendant to be eligible for the death penalty. The statute then requires the jury to consider the aggravating and mitigating factors. If the jury determines that aggravating factors "sufficiently outweigh" the mitigating factors, then the jury is permitted, but not required, to return a death sentence.

12. RSA 630:5, VI controls the consideration of mitigating evidence by the jury in the capital sentencing trial:

> In determining whether a sentence of death is to be imposed upon a defendant, the jury shall consider mitigating factors, including the following:
>
> (a) The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was **significantly** impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.
>
> (b) The defendant was under **unusual and substantial** duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(c) The defendant is punishable as an accomplice (as defined in RSA 626:8) in the offense, which was committed by another, but the defendant's participation was **relatively minor**, regardless of whether the participation was so minor as to constitute a defense to the charge.

(d) The defendant was youthful, although not under the age of 18.

(e) The defendant did not have a significant prior criminal record.

(f) The defendant committed the offense under **severe** mental or emotional disturbance.

(g) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(h) The victim consented to the criminal conduct that resulted in the victim's death.

(i) **Other factors in the defendant's background or character** mitigate against imposition of the death sentence. (Emphasis added.)

THE NEW HAMPSHIRE CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL

13. Under Lockett and subsequent cases, the capital sentencer must be permitted to consider "any aspect of a defendant's character or record and **any of the circumstances of the offense** that the defendant proffers as a basis for a sentence less than death." The "catchall" in RSA 630:5, VI(i) differs from the constitutionally required language in that the statute leaves out the phrase "and any circumstances of the offense."

14. New Hampshire's capital sentencing statute is based on the federal capital sentencing procedure which was previously found in the federal drug laws at 21 U.S.C. 848(e)-(n). That federal statute was passed as part of the "Anti-Drug Abuse Act of 1988." The capital sentencing procedures were removed from 21 U.S.C. 848 on March 9, 2006 by the "US Patriot Improvement and Reauthorization Act of 2005," Public Law 109-177. Federal sentencing in capital cases, including cases under 21 U.S.C. 848, is now governed by 18 U.S.C. 3591 et seq. See 18 U.S.C. 3591(b).

15. The repealed language in 21 U.S.C. 848(m) is the same as the language in RSA 630:5, VI. Specifically, 21 U.S.C. 848(m) describes statutory mitigating factors and then provides a

catchall in 21 U.S.C. 848(m)(10) which permits consideration of "other factors in the defendant's background or character [which] mitigate against imposition of the death sentence." This repealed provision, like RSA 630:5, VI, limits mitigation related to the offense itself to the statutory mitigating factors. The repealed federal catchall does not refer to "any circumstances of the offense" as required by Lockett and related U.S. Supreme Court cases.

16. The current federal statute differs from the repealed federal statute. The current federal death penalty statute describes mitigating factors and then sets forth a catchall which covers all evidence described in Lockett:

> In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:
>
> * * *
>
> (8) Other factors.— Other factors in the defendant's background, record, or character **or any other circumstance of the offense** that mitigate against imposition of the death sentence.

18 U.S.C. 3592(a)(8) (Emphasis added.).

17. Although there were no federal cases finding the earlier language in 21 U.S.C. 848(m)(10) to be unconstitutional, it is reasonable to conclude, in light of the holding in Lockett and Hitchcock, that the new federal statute contains a different catchall because broader language is constitutionally required.

18. Even though federal death penalty procedure changed, the legislature has not changed New Hampshire's capital sentencing laws. Under RSA 630:5, VI, a defendant is only permitted to argue mitigating evidence related to the offense as provided in the statutorily defined factors in RSA 630:5, VI(a)-(h). Under RSA 630:5, VI(i), the only additional mitigating evidence which may be considered is evidence relevant to the defendant's "background or character." The catchall does not permit consideration of other mitigating evidence related to the offense. As far

the circumstances relating to the offense itself, rather than the defendant's character and background, the statute restricts the defense to narrow categories of evidence.

19. Under RSA 630:5(a), the jury may consider the defendant's capacity to appreciate the wrongfulness of his conduct, but only if that capacity was "significantly impaired."

20. Under RSA 630:5(b), if the defendant was under duress at the time of the crime, the jury may consider that as a mitigating factor but only if the duress was "unusual and substantial." This language is difficult to justify in light of Lockett. By its terms, the statute would exclude duress which was "common" and substantial as opposed to "unusual" and substantial. That concept is not only contrary to Lockett, it defies common sense.

21. The jury might consider that the defendant was an accomplice to murder rather than the principal who committed the murder, but the jury is restricted from considering this as a mitigating factor unless it finds the defendant's participation was "relatively minor." RSA 630:5, VI(c). Again, there is no good reason for this limitation. The kind of hairsplitting required by the statute is totally inconsistent with the principle that all mitigating evidence should be considered. If a defendant's participation in the murder was "almost but not quite relatively minor," under the statute the jury is to disregard those circumstances. This kind of illogical result is simply not consistent with constitutional requirements.

22. Finally, the broadest restriction on mitigating evidence is in RSA 630:5, VI(f). That provision limits mitigating evidence of a defendant's mental or emotional disturbance at the time of the offense. Such evidence may only be considered in mitigation if it demonstrates a "severe" mental or emotional disturbance. There is simply no good reason for this restriction. When deciding whether a person lives or dies the jury should consider all evidence of mental illness, including mental or emotional disturbances at the time of the offense. There is no basis in U.S.

Supreme Court law for disregarding any evidence of mental illness simply because the mental illness is not "severe."

23. All of these restrictions on mitigating evidence relating to the offense violate the state and federal constitutional principle that the sentencer must be permitted to consider any factor relating to the offender or the offense as possible mitigating evidence. The unconstitutional limitation results from a catchall provision that only addresses the "character and background of the defendant" combined with restrictive language in a very short list of possible mitigating factors.

CONCLUSION

24. RSA 630:5, VI violates the principle set forth in Lockett and its progeny because the statute prevents consideration of all mitigation evidence relevant to the circumstances of the offense.

WHEREFORE the defense prays for:

I. A hearing on this motion;

II. An order from the Court declaring the New Hampshire capital sentencing statute, RSA 630:5, unconstitutional in violation of the Eighth and Fourteenth Amendments of the United States Constitution and the New Hampshire Constitution, part 1, articles 15, 18 and 33; and

III. An order from the Court precluding the imposition of the death penalty in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 22th day of June, 2007, to the Office of the Attorney General.

Richard Guerriero, Public Defender